U.S. Department of Labor
Telephone (415) 744-6577
Fax (415) 744-6569

Office of Administrative Law Judges
50 Fremont Street, Suite 2100
San Francisco, CA 94105

In the Ma#er of

STATE OF CALIFORNIA/HEALTH & WELFARE AGENCY,
Complainant,

CITY OF LOS ANGELES,
Intervenor,

v.

U.S. DEPARTMENT OF LABOR
Respondent.

CASE No: 96-JTP-6

In the Matter of

STATE OF CALIFORNIA/HEALTH & WELFARE! AGENCY,
Complainant,

COUNTY OF LOS ANGELES,
Intervenor

V.

U.S. DEPARTMENT OF LABOR,
Respondent.

CASE NO: 95-ITP-15

ORDER **DENYING** COMPLAINANT/INTERVENOR MOTION TO **COMPEL**
AND
ORDERGRANITNG RESPONDENT **MOTION** FOR PROTECTIVE **ORDER**

Procedural History

The procedural history of these two matters is set **forth** to indicate the time frame and background against which these **Motions** are brought.

Case No. 96-JTP-6 dates back to the State of California EDD's[1] November 30, 1995 appeal of the Department of Labor Respondent's November 6, 1995 Final Determination audit, findings involving JTPA funds used by a sub recipient of the City of Los Angeles. Action was stayed here pending resolution of suit brought by the State of California against the City of Los Angeles in a California Superior Court to collect from the City the amount the Department of Labor claims in this federal audit misuse action as owed to the Department of Labor by the State of California. Following July 1996 judgment for the City of Los Angeles in the Superior Court California the stay granted in this forum was lifted and the Washington D.C. Office of Administrative Law Judges again began processing action on the State of California's 1995 appeal of the Department of Labor federal audit determination. The City's request to intervene was granted in October 1996. After referral to San Francisco by the Washington D.C. Office of Administrative Law Judges, I issued an August 1997 Trial Notice setting hearing for November 7, 1997.

The year before, on August 8, 1996 Judge Lasky of this Office had scheduled Case No. 95-m-15 to be heard the week of November 12, 1996. Case No. 95-JTP-15 is au appeal of a June 15, 1995 Grant Officer Department of Labor Final Determination which disallowed costs of a State of California EDD sub recipient of the County of Los Angeles. The County is an Intervenor on this Case by later granted petition. This November 12, 1996 scheduled matter was continued before Judge Lasky to allow the State to submit additional information to the federal government, and it was reassigned to this ALJ.

Case No. 97-JTP-15 was then reset before me for April 29, 1997, to be heard in Sacramento, California the same week as I rescheduled Case No. 96-JTP-6.[2] At the parties' requests, for the reasons reflected in my October 23, 1997 Orders, hereby incorporated, this hearing was continued as was another rescheduled November 1997 trial date. These Orders reflect statements as to needs for discovery time extensions and that the parties perceived by the end of January 1998 or, by the State and City requested date, March 1998, they would then be in a position to move forward to trial or deposition of these matters.

Based on the parties' indication of their continuing discovery needs and the long-lingering of these cases at this Office, to control discovery this ALJ decided to retain these travel cases on

---

[1] State of California Employment Development Department EDD (State), City of Los Angeles (City) and County of Los Angeles (County), are variously so referred to within by these names or as Complainants/Intervenors, which they are in this administrative proceeding.

The U.S. Department of Labor (DOL) or its Grant Officer (GO) are variously so referred to within, or as the Respondent in this proceeding which arises from the GO's, the federal government's, disallowance of costs on its audit of JTPA funds.

[2] Another, JTPA case, Case No. 95-JTP-12 State of California EDD and City of Long Beach, Intervenor v. USDOL, since resolved by stipulation, was also set. Case No. 96-JTP-7 set before Judge Lasky/Torkington also settled by stipulation.

her docket and Ordered the submission of a status report from the parties. They were to set forth their current posture so that a determination could be made by this Office as to an anticipated trial date or final disposition. See my hereby incorporated March 25, 1998 Order of Consolidation and Order to Parties.

Following several status reports where Complainant/Intervenors requested additional time, with the Department's July 30, 1998 statements, the August 4, 1998 filing of the opposing parties Motion to Compel, and the Department's counsel's July 30, 1998 indication he would respond to the State and County/City discovery demands although he believed many were objectionable given the discovery history here, the parties were advised the matters would again be set for trial in Sacramento, California beginning January 11, 1999." (See incorporated August 27, 1998 Order to Parties.)

By my August 27, 1998 Order the parties were directed to take necessary action in a good faith attempt to amicably overcome any objection or obstacle to the proposed discovery which was the subject of Complainants/Intervenors August 5, 1998 Motion to Compel. Absent resolution, the Respondent-DOL was to Show Cause why the discovery requests of Complainant&t Motion to Compel should not be granted. (See Solicitor's September 14,1998 Extension Motion & Complainant/Intervenor's September 18, 1998 letter to Administrative Law Judge.) The DOL-Grant Officer's October 13, 1998 Motion for Protective Order followed.

Essentially in both Cases the State, on audit by the federal DOL-GO, was found to owe questioned JTPA monies to the federal DOL, to owe disallowed costs on federal GO audit: JTPA monies received through the State by City and County sub recipients and their grantees. The State seeks in its appeals here to obtain waiver of these disallowed costs by having California's Average Daily Attendance (ADA) costs stand-in for these disallowed costs, claiming DOL in the past accepted such ADA costs as disallowed costs stand-ins.

Thus has Complainant/Intervenors' Motion to Compel response to the their Second Set of Interrogatories and Third Set of Demands for Documents Production in each of these cases evolved before the Administrative Law Judge. The State's Motion to Compel concerns DOL's responses to four interrogatories of Set No. Two and nine Requests for Production of Set No. Three.

In its response to California's Motion to Compel, Respondent, the Department of Labor ("DOL") asks for three things: 1) a protective order denying the Motion to Compel; 2) an award of costs; and 3) an order awarding costs for future expenses. In the "Background section of the brief, the DOL gives an overview of the dispute as to whether Average Daily Attendance ("ADA") funds may be used as stand-in costs under the JTPA. Respondent's position on this issue is that *the statute prohibits the use of stand-in costs that would have been incurred even in the absence of the JTPA program," citing JTPA §141(b), 29 U.S.C. §1551(b) which limits program

*But by April 30, 1998 report DOL indicated it was ready to proceed but indicating a belief a hearing was unnecessary, only legal issues involved.

expenditures to "activities which are in addition to those which would otherwise be available in the absence of such funds." DOL. Brief at 3. Respondent characterizes ADA funds as blanket payments that cover all students who attend local school classes, regardless of whether the students are JTPA participants or whether the money is spent for JTPA purposes. The school districts would receive ADA funds even if there were no JTPA program." Further, Respondent states that in principle if "the State could document that ADA funds were used for specific allowable JTPA costs and would not have been spent in the absence of JTPA funds, the Grant Officer could . . . accept ADA stand-in costs."

The State has focused much of its discovery on showing that Respondent has accepted ADA stand-in costs in the past and has submitted affidavits to this effect. Respondent states first that it is 'irrelevant since, even if these ADA funds were accepted in the past JTPA bars their acceptance without a demonstration of their direct benefit to JTPA participants and unavailability in the absence of JTPA funds." Next, Respondent states that "the Grant Officer has never knowingly accepted ADA funds in the absence of such a showing," and offers a Declaration (Exhibit A) supporting this contention. DOL Brief at 4.

I. MOTION TO COMPEL/MOTION FOR PROTECTIVE ORDER

DOL argues first that California's motion to compel should be denied because California's discovery requests lack "reasonable particularity," as required by 29 CFR §18.19(c)(2). For instance, California seeks "all documents where you have discussed and/or implemented the 'maintenance of effort' doctrine, and all internal documents implementing the doctrine. Motion to Compel at 3,4. DOL argues that the requests are not limited by statute, time period or case. Even if the request were construed to apply only to JTPA, DOL states that a response would include "over 800 final determinations and millions of pages of audit documents."

Next, DOL argues that the discovery requests are not relevant, and not 'reasonably calculated to lead to the discovery of relevant evidence," as required by 29 CFR §18.14(a)-(b). Respondent argues that under *Micro Motion,* Inc. *v. Kane* Steel Co., 894 F.2d 1318, 1326-27 (Fed. Cir. 1980), a request based on mere suspicion or speculation is not relevant. Therefore, in the face of evidence which shows Respondent's policy that ADA funds cannot be used as stand-in costs, and DOL's affidavit stating that to their knowledge such costs have not knowingly been allowed, California's search for cases where ADA funds have been accepted as stand in costs is based only on speculation.

Finally, DOL argues that the production of the requested documents would be unduly burdensome and expensive, citing Kane, which states that even relevant discovery is not permitted "where no need is shown, or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information." In support of this argument Respondent states that the discovery request would

require a manual line-by-line search of approximately 750,000 pages of audit documents, at a cost of $30 per hour in overtime, 15 cents a page for copying (approximately $127,500) plus postage. Further, DOL states that California does not need the documents because California would be in possession of any decisions regarding ADA stand-in costs, because California is the only state that has ADA funds. DOL Brief at 5. In support of its position, DOL cites *Munoz-Santana* v. *INS*, 742 F.2d 561,563 (9th Cir. 1984) in which a request for every written decision over a two year period was denied where the requester failed to show that the criteria set out in the decisions were not an adequate substitute for the actual decisions.

Holding: On the Department's Motion for Protective Order I find that California's Motion to Compel should be denied

So Ordered.

An administrative law judge has the authority, under 29 CFR §18.15 to issue a protective order denying a discovery request on the basis of "undue burden or expense." I find DOL's argument persuasive and supported by analogy in the *Munoz-Santana* decision. First, I agree that the information requested is not relevant because the requirements for allowing stand-in costs are contained in JTPA 9141(b); 29 USC 1551(b), and the interpretation of guidelines is a legal question which would not be aided by a showing that at some time the Grant Officer knowingly or in error allowed the use of ADA funds as stand-in costs. If California can show that it is entitled to use ADA by satisfying the requirements, they should be allowed to do so. If they cannot make that showing, the costs cannot be allowed. The requested documents do not change the statutory requirements or California's burden to satisfy them.

Second, even if the documents have some small amount of relevance, this is greatly outweighed by the considerable time and expense required to search for and copy the documents. The situation here is similar to that in *Munoz-Santana* v. INS. In that case, the Ninth Circuit held that the district court abused its discretion in ordering the INS to produce every written decision over a two year time frame. Plaintiff claimed that these decisions were necessary to show that the INS' denial of his admission application "so departed from the established pattern of [INS] decisions as to be arbitrary and capricious." Id. at 562. The expense of partial compliance to the order was estimated at $15,996 in man-hours alone. The Ninth Circuit held that Plaintiff failed to show that the published criteria for assessing the application were not an adequate substitute for the requested documents. The situation in this case is similar in that the DOL has produced some of the requested documents and the available policy statements, and California has failed to show that these are not an adequate substitute for the documents that have not been produced.

California also moves to compel the production of "all ALJ decisions from January 1, 1985 through December 31, 1997." *See* California's Requests for Production Nos. 6,7,9 of its Third Set of Demands. Respondent argues that these are documents of public record, and that Respondent should not have to do legal research for Complainant. I agree with Respondent. Assuming that California seeks published ALJ decisions, this is legal research of documents

available just as easily to California. If California is seeking unpublished ALJ decisions[4], the request should still be denied because without precedential value, these documents can only be "needed" to try to show that the Grant Officer has allowed ADA stand-in costs, in which case the request should be denied based on the argument above.

II. AWARD OF COSTS

California requested all JTPA final determinations from 1982 to 1998, and the DOL responded with a partial production consisting of all determinations from 1991 to present. The DOL then billed California a total of $1,676 for the production of discovery documents; $960 in "search costs," $654 for copying, and $62 for postage. California has paid the $1614, but submitted the $960 under protest pending a decision by the ALJ on the matter. It is unclear whether or not California is refusing to pay the $62 for postage.

The award of costs for discovery is a fact specific determination. Until a request is made and the responding party is able to make an argument that the production created an 'undue burden or expense," an award of costs would be premature.

The DOL correctly states that the respondent is normally responsible for its own discovery costs. They argue, however, that since the request itself was overbroad and unduly burdensome and expensive, that California should pay the search and production expenses. Respondent cites two cases in support of its position. First, it cites ***In re Puerto Rico Electric Power Authority (PREPA),*** 687 F.2d 501 (1st Cir. 1982) for the proposition that where there are "identifiable expenses and burdens on the producing party," the court has the power to order the requesting party to reimburse reasonable search and production expenses. While the courts are clearly authorized to regulate the "terms and conditions" of discovery (see Fed.R.Civ.P. 26(c)(2)), *the* factual conditions discussed in ***PREPA*** are slightly different from the present case. In its discussion of Fed.R.Civ.P. 33(c), ***PREPA*** addresses an instance where "documents are certain to contain the answer" and "the burden of deriving... *the* answer is substantially the same for both parties,* in which case the requesting party bears the cost directly by sifting through the documents and copying them themselves, not by paying the other party to do so.

Respondent also cites *Celanese Corp. V. El duPont de Nemours & Co.*, 58 FRD 606, 611-12 (D.Del. 1973), where the court awarded reasonable search and production expenses to a respondent for an overbroad request. It should be noted, however, that the respondent in *Celanese* was not a party to the action.

Holding: This is a close call. 29 CFR $18.15 states, 'Upon motion by a party or the person from whom discovery is sought, and for good cause shown, the administrative law judge

[4] This AU has been unable to locate ALJ Case No. 87-JTP-9 in any research material available to this office.

may make any order which Justice require8 to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense..." (Emphasis added.) This provides a legal basis for making such an order. I am not completely persuaded that an order should be made in this case.

The discovery request was broad, but the DOL partially complied with the order to show good faith. This partial compliance may have been necessary to show California that during the last seven years, no JTPA final determination has allowed ADA stand-in costs. Further, these documents may have provided illustrations of how the stand-in cost policies have been applied in other cases. While California could have requested only final determinations involving stand-in cost8 far that time period, according to Respondent's description of how such a search must occur, Respondent would have had to hand search through the same paperwork to find all final determinations as they would have to isolate only specific types of decisions.

As discussed above, the situation here is similar to that in *Munoz-Santana v. INS, 742* F.2d 56 1,563 (9th Cir. 1984). There, the court Found that where the INS partially complied with a discovery order (supplying 31 of 84 decisions requested) the Plaintiff had enough documents to establish a pattern as to how similar cases were handled. It can be argued, then, that a plaintiff should be entitled to some final decisions from an agency in order to verify that cases are handled in accordance with agency policy. If this is the case, it was not unreasonable to require Respondents in this case to provide, at their own expense, a minimum level of compliance with California's discovery request. For this reason, I don't think it unreasonable to deny Respondent's the search costs at issue. So held.

ORDER

Based on the above, Complainants/Intervenors' Motion to Compel is **DENIED,** Respondents Protective Order request GRANTED. However Respondents $960.00 search costs arc denied.

Ellin M. O'Shea
ELLIN M. O'SHEA
Administrative Law Judge

Dated: NOV 13 1998
EOS: pam
San Francisco, CA

SERVICE SHEET

Caee **Name: STATE OF CALIFORNIA/HEALTH & WELFARE and THE CITY OF LOS ANGELES v. US DEPT OF LABOR; STATE OF CALIFORNIA/HEALTH & WELFARE** end **THE COUNTY OF LOS ANGELES v. US DEPT OF LABOR**

Case **No.:96-JTP-6; 95-JTP-15**

Title of Document(s): **ORDER DENYING COMPLAINANT/INTERVENOR MOTION TO COMPEL & ORDER GRANTING RESPONDENT MOTION FOR PROTECTIVE ORDER**

Thia is to certify that a copy of the above named document(e) wae

mailed to the following intereeted parties on **November 13. 1998**

Al Lee
Chief Deputy **Director**
State of **Calif./Health &**
Welfare Agency
Employment Development Dept.
P.O. Box 826880
Sacramento, CA 94280-0001

David A. Simpson
Compliance Resolution Unit
State of **Calif./Health &** Welfare Agency
P.O. **Box** 826880
Sacramento, CA 94280-0001

Marsha Nakawataee, Eeq.
State of **Calif. Employment** Development Department
Legal Office, MCI 53
P.O. Box 826880
Sacramento, CA 94280-0001

Hanuel Valenzuela
Senior Deputy County Counsel
County of Lob **Angeles**
Office of the County Counsel
648 **Kenneth** Hahn Hall of Admin.
500 West Temple St.
Los Angeles, CA 90012

Vera Sandroneky, Esq.
Staff Attorney
State of **Calif.** Employment Development Department
Legal Office
P.O. Box 826880
Sacramento, CA 94280-0001

James **K.** Hahn, City Attorney
Julie P. **Downey,** Senior Assistant City Attorney
Jessica F. Heinz, Assistant City Attorney
1800 City Hall East
200 North *Main* Street
Los Angeles, CA 90012

Scott **Glabman,** Eeq.
Asst. Counsel for Litigation
Office of the Solicitor - **USDOL**
Suite N-2101
200 Confititution Ave., N.W.
Washington, DC 20210

Office *of* the special Counsel
U.S. Dept. of **Labor** - ETA
200 **Constitution** Ave., N.W.
Suite N-4671
Washington D.C., 20210

Peter F. **Schabarum,** Chairman
Los Angeles County Board of Supervisor6
Community & Senior Citizens Services
3175 West 6th St.
Los Angelea, CA 90020

Brian T. Keilty, Administrator
U.S. Department of Labor/ETA
Office of Financial & Admin. Management
Suite N-4671
200 Constitution Ave., N.W.
Washington, D.C. 20210

R. Lance Grubb
Grant/Contract Officer
Office of Grants & Contracte
200 Constitution Ave., N.W.
Suite N-4716
Waehington, D.C. 20210

USDOL

David 0. Williams
Office of the Special Counsel
U.S. Dept. of Labor - ETA
200 Constitution Ave., N.W.
Suite N-4671
Washington, D.C. 20210

PENNY A. MIMS
Legal Technician